United Nations AT/DEC/1119

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1119

Case No. 1230: AL-ZEIN

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Jacqueline Scott;

Whereas, on 10 May 2000, Hanan Al-Zein, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 14 July 2001, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal to order:

"1. Compensation for the remainder of [her] working service with the Agency which were twelve years ...

2. Compensation for two years;

3. Compensation for ... psychological injury

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2002 and once thereafter until 31 May 2002;

Whereas the Respondent filed his Answer on 12 May 2002;

Whereas the facts in the case are as follows:

The Applicant joined UNRWA on a temporary indefinite appointment as an Area Staff member in the capacity of Staff Nurse (Relieving) Grade 07, Jordan, effective 18 October 1979. On 1 March 1984, the Applicant was promoted to the post of Area Nursing Officer, Grade 09, and effective 1 June 1984 she was promoted to Grade 10.

On 12 May 1999, the Applicant wrote to the Field Personnel Officer, Jordan, referring to a meeting which had taken place on 6 May with the Chief, Field Health Programme, Jordan. During this meeting, she had apparently been informed that, due to a restructuring of the Department of Health, three Grade 10 Area Nursing Officer posts (including the Applicant's post) were to be deleted from the staffing table: all three staff members were offered posts of Senior Staff Nurse, Grade 9, with salary and grade protection. The Applicant declined the offer, and, in her letter expressed instead a wish to be "considered for education" and to be transferred to one of two vacant posts, that of School Supervisor for Health Education or Senior Vocational Training Instructor. On 17 May 1999, the Chief, Field Health Programme wrote to the Field Personnel Officer (FAO) and the Deputy Administration Officer (DUO), and requested that her post be declared redundant. In a hand-written note on that memorandum, dated 19 May, the FAO and the DUO requested the Director of UNRWA Operations to approve further examination of the Applicant's request and that she be declared provisionally redundant only if a transfer proved to be impossible. The Director of UNRWA Operations approved this request on 6 June. However, in a letter of the same date notified the Applicant that he had no alternative but to declare her "provisionally redundant". He added that efforts would be made to find her an alternative suitable post, however, if such efforts were not successful, the letter was to be considered a notice of termination under staff rule 109.9.

On 15 June 1999, the Deputy Director of UNRWA Operations offered the Applicant a transfer to the post of Staff Nurse, Grade 08 at the Amman New Camp Health Centre with salary and grade protection. In her reply of 30 June 1999, the Applicant pointed out that the proposed position would put her back in the position she had been in when she joined the Agency and under the supervision of

someone she had supervised herself for more than 15 years. Therefore, she asked to be considered for another post more suited to her qualifications and experience.

On 1 August 1999, the Applicant appealed to the Area Staff Joint Appeals Board (JAB).

In a letter dated 2 August 1999, the Deputy Director of UNRWA Operations offered the Applicant a transfer to the post of Senior Staff Nurse, Grade 09 at the Nuzha Health Centre with salary and grade protection. On 30 August, the Applicant advised the Director of UNRWA Operations that this offer of alternate employment, like the others, was not commensurate with her experience and qualifications. In his reply of 2 September, the Director of UNRWA Operations indicated that it was not clear whether or not the Applicant had accepted the offer; that "he had explored all possibilities to absorb [her] against a [suitable] post ... but [that] all efforts to satisfy [her] ambitions were unsuccessful"; and, that if she did not report for duty at the Nuzha Health Centre by 29 September, she would be terminated on redundancy grounds. Further efforts to find a suitable post for the Applicant were unsuccessful, and, following her failure to report for duty on 29 September, her appointment was terminated.

The JAB adopted its report on 6 February 2000. Its evaluation and judgement, and recommendation read, as follows:

> "**III. EVALUATION AND JUDGEMENT**
>
> 17. ...
>
> a) The Board noted that the decision to terminate the Appellant's [a]ppointment on redundancy basis was properly made in accordance with area staff rules and regulations.
>
> b) The Board ... established that the Appellant had a 20-year of long commendable service ...
>
> c) ... [T]he Board is of the [o]pinion that the Administration should have made a little effort so as not to lose such a good staff member.
>
> **IV. RECOMMENDATION**
>
> ... [T]he Board unanimously makes its recommendation to uphold the Administration's decision appealed against and that the case be dismissed.
>
> However and for humanitarian reasons the Board is of the opinion that since the Appellant is a widow and supporting two children, to compensate her for her remaining five years with the Agency."

On 6 March 2000, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed her as follows:

> "...
>
> I ... disagree with the Board's finding that the Administration should have exercised more effort "*not to lose such a good staff member*". The Administration can only be expected to undertake reasonable efforts to find a staff member a suitable post. This it did, and in any event there were no other suitable posts which could have been offered to you. Accordingly, I have accepted the Board's recommendation that the Administration's decision appealed against should be upheld, and have dismissed your appeal."

On 14 July 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Agency did not apply the criteria contained in paragraph 14.7 of Personnel Directive PD A/9/Rev.6/Amend.1 of 1 January 1999.

2. The Applicant was treated unfairly as the Agency did not make any effort to place her in a post in the Department of Education as she requested. Furthermore, it ignored her qualifications as an educator, and did not give her the chance to compete for suitable alternative posts during the redundancy period.

Whereas the Respondent's principal contentions are:

1. In the absence of any suitable vacant post, the Respondent had no option but to terminate the Applicant's appointment at the end of her period of provisional redundancy.

2. Had she accepted either of the proffered posts, the Applicant would have had priority for transfer to a post at her personal grade when a post for which she was qualified became vacant. Nonetheless, the Applicant chose to reject the offers of alternate employment.

3. Upon the termination of her appointment, the Applicant was paid a termination indemnity to compensate her for the loss of her employment, in accordance her entitlement prescribed by Area Staff Rule 109.9. Thus, the Applicant was compensated for "*her remaining five years with the Agency*".

The Tribunal, having deliberated from 11 to 24 July 2003, now pronounces the following Judgement:

I. On 6 May 1999, the Applicant who was an Area Nursing Officer, Grade 10, was informed that in furtherance of the proposed restructuring of the Department of Health, the three Area Nursing Officer, Grade 10 posts (including the Applicant's post) were to be deleted from the staffing table. Neither the legitimacy nor the *bona fides* of this decision is an issue in these proceedings.

II. Those three staff members (including the Applicant) were offered posts as Senior Staff Nurse, Grade 9, with salary and grade protection. Two of the Area Nursing Officers accepted these alternative posts, but the Applicant declined to do so. She asked that consideration be given to assigning her to a post in the Education Department and she identified two vacant posts: (i) School Supervisor for Health Education, and (ii) Senior Vocational Training Instructor at Amman Training Centre, and asked that consideration be given to appointing her to one or other of the posts.

III. As the Applicant had not accepted the post of Senior Staff Nurse, Grade 9, with salary and grade protection, the Chief, Field Health Programme, Jordan, requested that her post be declared provisionally redundant. Here again neither the legitimacy nor *bona fides* of these decisions have been challenged, save that the Applicant submits that, in relation to Senior Vocational Training Instructor the post, she had priority to be selected over the candidate who was ultimately appointed thereto. This issue is dealt with later on in this Judgment. What is in issue is whether having declared the Applicant to be provisionally redundant, the Agency fulfilled its obligation to take reasonable steps to provide her with a suitable alternative post and complied with its obligations as to the priority to be given to the Applicant in seeking to so accommodate her in such a position during the period of her provisional redundancy.

IV. By letter of 6 June 1999, the Director of UNRWA Operations, Jordan, declared the Applicant's post provisionally redundant. He advised her that the Agency would try to find the Applicant an alternative suitable post but that if those efforts proved unsuccessful she would be terminated on redundancy grounds effective close of business on 30 September 1999.

Paragraph 14 of Personnel Directive PD A/9/Rev.6/Amend.1 obliges the Administration during the period of provisional redundancy to look for suitable placement for a redundant staff member and provides that, if placement cannot be made to a suitable post, the staff member's appointment would be terminated and prescribes

that in that event, a termination indemnity be paid to such person. It defines "*a suitable post*" as being:

> "14.7.1 a post in the same or similar occupational group with the same grade and the same salary increments for which the staff member is qualified in most aspects: or
>
> 14.7.2 a post in a lower grade or with a lower salary or increments to which the staff member agrees to be transferred; or
>
> 14.7.3 any post which, in the opinion of the Commissioner General and having regard to all the circumstances, including the views of the staff member; is not to the disadvantage of the staff member."

The Administration did not offer to the Applicant *an alternative post in the same or similar occupational group with the same grade and with the same salary increments for which she was qualified in most aspects* but the record shows that this was because the Respondent did not have any such posts vacant during the relevant period and the Applicant does not allege that there was any such post vacant during the period nor does she identify such a post or allege that such post existed and that it was denied to her.

V. The Tribunal is satisfied that due consideration had been given to appointing the Applicant to the posts which had been identified by her in the Department of Education. It is satisfied that she was not offered an appointment to either such post, because in relation to the post of School Supervisor for Health Education, Grade 12, this post was filled by another redundant staff member with a personal Grade of 12 (whereas the Applicant's Grade was 10), and in relation to the position of Senior Technical Instructor (Para-Medical), Grade 12, the Applicant had neither the required professional nor teaching expertise stipulated in the Occupational Classification Manual, nor was her B.Sc. (Nursing) relevant to the Para-Medical courses to be taught at the Centre. Furthermore, neither said post would have amounted to "*a suitable post*" as defined by Personnel Directive A/9 vis-à-vis the Applicant as neither was of the same grade as the Applicant so that to have appointed her to either position would have constituted a substantive promotion. A promotion was not her entitlement under the provisions of the said Personnel Directive.

Moreover, to have transferred the Applicant to either post would also have been a transfer to another discipline which likewise was not her entitlement under the Personnel Directive.

VI. In her submission to the JAB the Applicant had contended that paragraph 14.2 of PD A/9 gave her priority over the successful candidate for the post of School Supervisor Health Education. The Tribunal rejects this submission as it is based on a misunderstanding of the appropriate provision. Paragraph 14.2 deals with the situation as to which of two or more staff members should be selected for redundancy, if they all occupy the same post and only one staff member is to be redeployed or separated. It provides for what is commonly referred to as the "*first in, last out principle*". It does not deal with the situation pertaining to the case where there are staff members from different posts competing for the same vacant post. In this case, the position was given to the person who already had held a Grade 12 position so that it was "*a suitable post*" under the Personnel Directive from the point of view of the successful candidate, whereas it would not have been from the point of view of the Applicant, given that her personal grade was Grade 10.

VII. On 15 June 1999, the Applicant was offered a transfer to the post of Staff Nurse, Grade 08, at Amman New Camp Health Centre, again with salary and grade protection, and advised that, if she accepted this offer, the provisional redundancy would be withdrawn. She again chose not to take up this offer and again sought consideration for an appointment which she believed would be more in keeping with her experience and qualifications.

By letter of 2 August 1999, the Applicant was offered a transfer to the post of Senior Staff Nurse, Grade 09, at "J/Nuzha MCH Centre" and again with salary and grade protection. She responded by advising that she considered that the Agency's offers of alternative employment were not suitable, having regard to her qualifications and experience. Neither offer could be considered as an offer of "*a suitable post*" as each was a transfer to a post in a lower grade and the Applicant had not agreed to be so transferred. It is arguable that these offers might have constituted the offer of a suitable post within the meaning of paragraph 14.7.3 of PD A/9, save that the views of the Respondent were neither sought nor given. It was never argued that the said offers or any of them were offers of a suitable post, so as to seek to deny the Applicant her separation entitlements.

VIII. In the opinion of the Tribunal, the nature and extent of the offers made to the Applicant show that there was a willingness on the part of the Agency to seek to accommodate the Applicant and it rejects any suggestion that there was anything in the nature of prejudice shown against her.

In relation to the offers made to the Applicant, they were made with salary and grade protection. Had she accepted either one, it would have ensured that she would have remained in the employment of the Agency and, once transferred, she would have enjoyed priority for transfer to *"a suitable post"* equal to her personal grade (Grade 10), once such post had become available, by reason of the provisions of paragraph 14.9 of the said Personnel Directive.

The Applicant had submitted to the JAB that she should have been retained in her post as Area Nursing Officer until she was absorbed in a suitable post. This suggestion is not only contrary to the provisions of paragraph 14 of PD A/9 but would be a waste of resources to allow a staff member to occupy a post which was no longer required. She would have enjoyed no right to such unusual treatment.

IX. The Tribunal is satisfied that the Applicant has failed to establish any breach of an entitlement under the provisions of Personnel Directive A/9 or otherwise. It is satisfied that she has failed to establish any impropriety on the part of the Administration or to establish any malice, prejudice or ulterior motivation in the way in which she was treated.

X. Accordingly, all claims are rejected.

(Signatures)

Kevin **Haugh**
Vice-President, presiding

Spyridon **Flogaitis**
Member

Jacqueline R. **Scott**
Member

Geneva, 24 July 2003

Maritza **Struyvenberg**
Executive Secretary

/AL-ZEIN

United Nations AT/DEC/1120

Administrative Tribunal

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30 September 2003
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ADMINISTRATIVE TRIBUNAL

Judgement No. 1120

Case No. 1231: KAMOUN Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis; Ms. Brigitte Stern;

Whereas on 23 July 1996, 5 March 1998 and 25 March 1999 Mr. M'Hamed Ali Kamoun, former staff member of the United Nations filed three applications requesting the Tribunal to rescind the decision to suspend him and constrain him to take forced leave; to reinstate him in the post and functions he formerly occupied; and to award damages in reparation for the renewed and persistent psychologically and professionally damaging circumstances.

Whereas on 29 July 1999, the Tribunal pronounced Judgement No. 925 in the three *Kamoun* cases and concluded as follows:

> "... important material and moral damage was inflicted on the Applicant. His career was abruptly interrupted. The efforts made by the Administration to provide the Applicant with a position in accordance with his qualifications and consonant with his health and family conditions were, at best, perfunctory. He was offered positions that he could not accept and his refusals to accept them were supported in each case by the Health Department. The Tribunal does not consider that these offers were made in good faith.
>
> Furthermore, the anguish of being left without any functions to perform, for a prolonged period of time, while even his offer of gratuitous work for the Organisation was not accepted, constitutes a moral damage that must be compensated ...

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For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant an amount equivalent to one year of the Applicant's net base salary at the rate in effect on the date of separation."

Whereas on 18 January, 7 May and 17 August 2001 the Applicant filed further Applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas on 5 November 2001, the Applicant, after making the necessary corrections, filed a further Application, the pleas of which read as follows:

"B. Pleas

May it please the Tribunal to order or take the following measures and/or decisions:

(a) As a preliminary or provisional measure would it summon and examine the two investigators of the Office of Internal Oversight Services (OIOS) ...

(b) On the substance may it please the Tribunal to rescind the Secretary-General's decision of 29 June 1999 ...

and consequently ... rescind the decision of 13 August 1999 denying the [request] for direct submission of the dispute to the Tribunal ... and render the second report [of the Joint Appeals Board] of 28 December 1998 null and void ...

(c) May it please the Tribunal to order the Administration to honour its obligations specifically and effectively ...

(d) Law and past precedent cite the right to "fair and equitable compensation". ...

..."

Whereas at the Respondent's request, the President of the Tribunal extended to 31 March 2002 and then to 31 August 2002 the time limit for filing the Respondent's answer;

Whereas the Respondent filed his answer on 19 August 2002;

Whereas on 23 June 2003 and 26 June 2003, the Applicant submitted additional documents;

Whereas on 4 July 2003, the Tribunal decided that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

On 3 June 1999, the Administration sent the Applicant a personnel action form (P.35) informing him that he would be terminated on 1 July 1999 without being reinstated in the Information Service.

In a letter dated 21 June 1999, the Applicant asked the Secretary-General to suspend action on that decision. The Joint Appeals Board adopted its report on 29 June 1999. The Panel recommended to the Secretary-General that the Applicant be reinstated for a token one-day period so he could collect his belongings before separating from service upon retirement.

On 29 June 1999, the officer-in-charge of the Department of Management informed the Applicant that the Secretary-General had decided not to grant his request for suspension of action on the decision because it was not an administrative decision in the sense of Regulation 11.1 of the Staff Regulations and therefore the Board was not validly seized of it and because he did not agree with the Board that the definition of irreparable damage, for the purposes of a request for suspension of action, included moral damage.

On 30 June 1999, the Applicant separated from the Organization.

On 29 July 1999, the Tribunal pronounced Judgement No. 925.

On 3 August 1999, the Applicant filed an appeal against the implications and effects of the personnel action form (P.35) of 3 June 1999 and, on 27 August, he brought the matter to the Joint Appeals Board.

On 28 December 1999, the Joint Appeals Board adopted its report. Its considerations and recommendations were as follows:

"*Considerations*

39. Since Respondent did not touch upon the substance and simply argued that the appeal was inadmissible the Panel confined itself to that aspect.

...

43. The facts having been clearly established, the Panel turned to the issue of law, namely whether the termination of a staff member who has reached the statutory retirement age constitutes an administrative decision in the meaning of Staff regulation 11.1 ...

...

45. The Panel's considerations on the admissibility of the present appeal are as follows.

46. First and foremost, the Panel considered whether or not the content of personnel action form P.35 of 3 June 1999 was in the nature of a decision. ...

47. ... the Panel noted that personnel action form P.35 of 3 June 1999 takes note of a fact (the staff member concerned would turn 60 on 15 June 1999) and the law (the General Assembly has set a mandatory retirement age of 60 for staff members appointed prior to 1 January 1990). Its content is therefore purely declaratory. ... The separation of a staff member who has attained the statutory retirement age is a natural fact of which the Administration is simply taking note.

...

52. Personnel action form P.35, in the circumstances of the present case, therefore cannot be considered an administrative decision, the prerequisite for the Joint Appeals Board to be able to consider an appeal filed by a staff member.

53. Secondly, the Panel noted other grounds for the Joint Appeals Board's incompetence to consider the appeal, based on the principle of *res judicata*.

54. The Panel noted that, by challenging his being terminated *directly after being on special leave with full pay* (emphasis is the Panel's), the Applicant was in effect seeking to obtain compensation for the moral damage caused by being placed on special leave, which compensation he assessed as 'reinstatement for at least a token one-day period'.

55. Yet in its Judgement No. 925, *Kamoun* (29 July 1999) the Tribunal had already ruled on the matter of Applicant being placed on special leave and had set the appropriate compensation for the damage suffered, calculated at the date of his cessation of service. ...

56. The Application is therefore contrary to the principle of *res judicata*, which principle the Tribunal recognizes ...

...

Conclusion

58. ... the Panel concludes that this appeal is inadmissible and declares itself not competent to consider it."

On 14 March 2000, the officer-in-charge of the Department of Management transmitted the report to the Applicant and informed him that the Secretary-General had accepted the Board's findings and its unanimous conclusion that the appeal was inadmissible.

On 5 November 2001, the Applicant filed the Application mentioned above.

Whereas the Applicant's principal contentions are as follows:

1. The Applicant claims that being terminated directly from a situation of relegation to special leave with full pay (without even a token one-day period of reinstatement, notwithstanding the favourable opinion of the Joint Appeals Board) is tantamount to a veiled sanction.

2. The Applicant also claims that the P.35 is in violation of the principle of compensation which calls, at the very least for a return to the *statu quo ante*, not to mention the right to rehabilitation, reparation and compensation for moral and material damage in order to erase the effects of the injury done.

3. The P.35 has all the characteristics of an administrative decision based on the definition given by the members of the Joint Inspection Unit in a recent report on the administration of justice.

4. The Applicant points out that pursuant to Staff regulation 9.1 and Staff rule 109.10, individuals may be retained beyond the normal retirement age by decision of the Secretary-General. He also draws attention in this regard to administrative instruction ST/AI/213 on retention in service and employment beyond age of retirement.

Whereas the Respondent's main contentions are as follows:

1. The Respondent maintains that personnel action form P.35 of 3 June 1999 informing the Applicant of his separation effective 30 June 1999 due to his having reached retirement age, pursuant to Staff regulation 9.5 is not an administrative decision that violates the Applicant's conditions of employment and that can be appealed to the Tribunal.

2. The Respondent also maintains that pursuant to the principle of *res judicata*, the Applicant cannot sue the Administration for further compensation for facts which have already been dealt with in Administrative Tribunal Judgement No. 925.

The Tribunal, having deliberated from 4 to 24 July 2003, now pronounces the following judgement:

I. The case concerns a decision of 3 June 1999 whereby the Administration sent the Applicant a personnel action form P.35, notifying him that he would be terminated effective 1 July 1999. The Applicant began by filing an appeal with the Joint Appeals Board requesting suspension of action on the decision and a token one-day period of reinstatement prior to retirement. Although the Board agreed to that request on 29 June 1999, the Secretary-General rejected it on the grounds that he was against the idea of compensation for moral damage. The Applicant then filed an appeal against his termination, again with the Joint Appeals Board. The Board completed its report on 28 December 1999, but did not rule on the substance as it considered the appeal inadmissible on two grounds. First, it said that termination of a staff member who has reached the statutory retirement age is a natural event of which the Administration was simply and quite rightly taking note. It then cited another reason why it was not competent to consider the case, namely the principle of *res judicata*.

II. The Applicant asked the Tribunal to consider the P.35 personnel action form as an administrative decision which had caused him injury. In effect he claimed that being terminated directly from a situation of relegation to special leave with full pay (without at the very least a token one-day period of reinstatement, notwithstanding the favourable opinion of the Joint Appeals Board) was tantamount to a veiled sanction. He also claimed that the P.35 form had been transmitted to him in violation of the principle of compensation which calls for at least a return to the *statu quo ante*, not to mention the right to reparation and compensation for the moral and material damage, to erase the effects of the injury done.

III. By way of defence, the Respondent maintained that, according to the principle of *res judicata*, the Applicant could not sue the Administration for further compensation for events that had already been dealt with in Judgement No. 925 of 29 July 1999.

In this case the Tribunal concluded as follows:

> "... important material and moral damage was inflicted on the Applicant. His career was abruptly interrupted. The efforts made by the Administration to provide the Applicant with a position in accordance with his qualifications and consonant with his health and family conditions were, at best, perfunctory. He was offered positions that he could not accept and his refusals to accept them

were supported in each case by the Health Department. The Tribunal does not consider that these offers were made in good faith.

Furthermore, the anguish of being left without any functions to perform, for a prolonged period of time, while even his offer of gratuitous work for the Organisation was not accepted, constitutes a moral damage that must be compensated (cf. Judgement No. 812, *Everett* (1997))."

The Tribunal awarded the Applicant an amount equivalent to one year of base salary by way of compensation for the damage.

IV. In considering the Applicant's claims, the Tribunal notes that the Applicant is asking the Tribunal to evaluate the legal consequences of the personnel action form of 3 June 1999. The Joint Appeals Board made a pronouncement on that application, judging that personnel action form P.35 merely took note of a fait accompli and was not an administrative decision that could be appealed to the Tribunal. The Tribunal considers that by asking it to recharacterize the personnel action form (P.35) as a decision that is appealable — which, in fact it is — the Applicant is, in fact, hoping that Judgement No. 925 of 29 July 1999 will be revised.

V. In order to assess the Applicant's request, the Tribunal will rule bearing in mind Rule 12 of the Tribunal's Statute which states that:

"The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties."

The Tribunal has consistently taken the position in its case law that a judgement can be revised only in very exceptional cases. For example in Judgement No. 672 *Burtis* (1994):

> "The Tribunal finds nothing in the Applicant's request which could justify a revision of the previous decision. The Tribunal finds that the Applicant does not allege any new facts of such a nature as to be a decisive factor warranting a revision of the judgement, under article 12 of the Tribunal's Statute."

In accordance with the Statute and case law, in order to be able to apply for revision of a judgement it is necessary to satisfy certain formal and substantive conditions. As regards formal conditions, article 12 sets a time limit for filing the application. As regards substantive conditions, in order for an application to be admissible the Applicant must on the one hand, plead discovery of a new fact, that is to say one that was not known at the time the judgement was given, and, on the other, the new fact must be of such a nature as to be able to influence the outcome of the dispute as reflected in the judgement.

VI. In the case in point, in order to be able to file the appeal provided for in article 12 the Applicant must meet both these conditions. In order for the request to be admissible the application must be filed within 30 days of the discovery of the fact the Applicant is alleging and within one year of the date of the judgement. In addition, the Applicant must establish that the decisive factor upon which he is basing his application was unknown to him at the time the judgement was given.

VII. The Tribunal notes that the Applicant was aware of the date of his retirement and that personnel action form P.35 was sent to him on 3 June 1999, prior to the Judgement of 29 July 1999 whose revision he is implicitly requesting. This fact is confirmed since in its Judgement No. 925 (1999) the Tribunal mentions the Applicant's retirement:

> "When the circumstances surrounding the decision are not at all clear, as in the present case, the prolongation of leave presented the Applicant with a fait accompli without any escape, especially since he was already close to obligatory retirement and making a mockery of his rights."

The Tribunal finds that one of the conditions for admissibility, namely, a new fact that was not known at the time the judgement was given has therefore not been met. Since both conditions provided for in article 12 must be met and one of those conditions has not been, the Application is consequently inadmissible.

VIII. The Tribunal rejects the Application as a whole.

(Signatures)

Julio **Barboza**
President

Spyridon **Flogaitis**
Member

Brigitte **Stern**
Member

Geneva, 24 July 2003

Maritza **Struyvenberg**
Secretary

United Nations AT/DEC/1121

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1121

Case No. 1234: SAFFIR Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Jacqueline R. Scott;

Whereas at the request of John Saffir, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 August 2001 and thereafter until 30 November 2001;

Whereas, on 28 November 2001, the Applicant filed an Application containing pleas which read, in part, as follows:

"II: PLEAS

...

11. On the merits, the Applicant respectfully requests the Tribunal to find:

... ;

That the decision to separate [the Applicant] from service as of 1 August 1998 was improperly motivated by extraneous considerations and was flawed by procedural irregularities ...

That the decision ... to terminate [the Applicant's] appointment, without review and response to his allegations of discriminatory treatment was a denial of due process and an abuse of authority; and

That the above contested decision was in violation of [General Assembly] resolution [37/126] ...

12. ... [and] to order:

That [the Applicant] be fully reinstated retroactively from 1 August 1998 ... with all formal and financial consequences including [his] reintegration into the [United Nations Joint Staff] Pension Fund [(the Pension Fund)] and replacement into the Pension Fund of the money [that the Applicant] was compelled to withdraw there-from as a result of his wrongful termination; and

That the [Applicant] be awarded damages in the amount of two (2) years net base salary ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2002 and once thereafter until 31 May 2002;

Whereas the Respondent filed his Answer on 24 may 2002;

Whereas the Applicant filed Written Observations on 16 July 2002 and, on 5 November 2002, the Respondent submitted comments thereon;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on 18 August 1992, on a short-term appointment, as an Inventory and Supply Clerk at the G-2 level, in the Distribution Section, Office of Conference Services (OCS). Effective 24 December 1992, the Applicant's appointment was extended and converted to a fixed-term appointment and, effective 1 September 1994, he was promoted to the G-3 level.

On 9 December 1994, the Director, Conference Services, recommended that the Applicant's appointment, among other staff members whose appointments were due to expire on 31 December, be extended for a period of six months "as replacement for staff on mission, on loan to other Departments, or Special Leave Without Pay". The Applicant's contract was so extended and subsequently extended again. On 5 December 1995, the Director, Conference Services, recommended that the Applicant's fixed-term appointment, due to expire on 31 December, be extended by a further two-year period, noting that the Applicant, as well as four other staff members mentioned, were against established posts and that their performance had been very good.

On 15 December 1995, the Office of Human Resources Management (OHRM) notified the Executive Office, Conference Services, that due to the prevailing financial situation of the Organization, only a three-month extension could be authorized. However, on 20 December, OHRM informed that they were in a position to endorse a one year extension. The Applicant's contract was so extended, and subsequently extended several more times.

In the context of 1998-1999 Redeployment Programme, it was decided that the fixed-term appointments of four staff members in the Distribution Section, would not be renewed. Subsequently, on 2 December 1997, the Under-Secretary-General for Management sent a memorandum to the Heads of Departments/Offices, providing guidance on procedures to be followed including the establishment of joint panels to deal with staff redeployment.

On 5 December 1997, the Applicant was informed that his fixed-term appointment would be extended for a final period of one month, through 31 January 1998.

In accordance with the procedures outlined in the 2 December 1997 memorandum, an ad hoc joint Department of General Assembly Affairs and Conference Services (DGAACS) staff/management advisory panel met and reviewed the performance of 26 General Service staff members, including the Applicant. The panel submitted its report on 23 December 1997, identifying only four staff members for redeployment, not including the Applicant.

In February 1998, a number of staff members in the Distribution Section, including the Applicant, filed complaints with the Panel on Discrimination and Other Grievances, concerning the "general conditions of work in the Distribution Section".

On 1 March 1998, the Applicant was given a five-month contract, transferring him from an established post to the post of another staff member, who was on mission and scheduled to return to Headquarters on 31 July 1998.

On 22 April 1998, the Deputy Chief, Distribution Section, recommended that the Applicant's contract be extended. However, on 25 June, the Applicant was informed that, due to the impending return from mission of the staff member whose post the Applicant was placed against, his fixed-term appointment would not be extended beyond 31 July.

On 23 July 1998, the Coordinator, Panel on Discrimination and other Grievances, wrote to the Assistant Secretary-General, OHRM, drawing her attention to the adverse work situation in the Distribution Section, DGAACS, and informing of the Panel's belief that

> "the principal cause of the current negative situation in staff/management relations in the Section is the managerial style, personnel practices and procedures of its Chief ... The Panel, ... recommends that the implementation of a series of recent personnel decisions made by the Chief of Section be suspended pending the outcome of such review. The matter is urgent, since ... two staff members will not have their contracts renewed as from 1 August."

On 31 July 1998, the Applicant separated from service. On the same date, he wrote to the Secretary-General requesting administrative review of the decision not to renew his fixed-term appointment.

On 12 November 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 14 December 1998, a Staff/Management Task Force convened by the Under-Secretary-General for Management, to review the working conditions, management issues and practices, work processes and structure of the Distribution Section, adopted its final report and made, inter alia, the following recommendation:

> "...
>
> Every effort should be made to re-employ Mr. John Saffir and ... on fixed-term appointments. Priority should be given to reabsorbing them in the Distribution Section, where their past experience would give them a comparative advantage. If reabsorption in the Distribution Section is not feasible, consideration should be given to any other future openings in a related occupation group or elsewhere in the Secretariat, without prejudice to their eligibility for consideration for future vacancies in the Distribution Section.
>
> The Department of Management should review the possibility of providing two posts in the Distribution Section for the early re-employment of the two former staff members".

Consequently, effective 3 May 1999, the Applicant was rehired on a fixed-term appointment in DGAACS.

The JAB adopted its report on 2 October 2000. Its considerations and recommendation read, in part, as follows:

"***Considerations***

...

32. The Panel found that the Appellant had to separate from the Organization as a result of the mismanagement problems that his section was facing during that time. The Panel was satisfied with the fact that the above was recognized by the Staff/Management Task Force's report and by its recommendation to re-employ the Appellant. The Panel took note that, based upon the above, the Appellant was rehired on a fixed-term appointment in May 1999, and since then, he is serving with DGAACS. The Panel agreed with the Respondent that the contested decision was moot due to the subsequent decision to rehire the Appellant.

33. ... The Panel noted that although the above separation indicated serious mismanagement, this was not tantamount to an action motivated by extraneous considerations and flawed by procedural irregularities. The Panel felt, therefore, that the rehiring of the Appellant rectifies the harm he suffered from his separation and there is no need for recommending additional compensation.

...

35. The Panel did not feel it could recommend the Appellant's retroactive reinstatement bearing in mind that the Appellant held a fixed-term appointment. However due to the special circumstances of this case, the Panel agreed with the Appellant that the Administration should take the necessary action so that the Appellant would not suffer any financial consequences with regard to the Pension Fund ...

Recommendation

36. The Panel *unanimously recommended* that the Organization takes the necessary steps, by paying its part and the Appellant's part to the Pension Fund, to reintegrate the Appellant into the Pension Fund so that there will be no break in his pension contributions despite his seven months of non-service.

..."

On 13 February 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to accept the JAB's unanimous recommendation.

On 28 November 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to rehire the Applicant in May 1999 does not render moot the decision not to renew his contract in August 1998.

2. The Respondent should pay the Applicant the nine months wages, which he was wrongfully denied by the decision not to renew his appointment.

3. The decision not to renew his appointment was tainted by procedural irregularities and a personal vendetta against him. The Applicant's rights of due process were violated.

Whereas the Respondent's principal contentions are:

1. The Applicant served on a fixed-term appointment, which does not carry any expectancy of renewal. The decision not to renew the Applicant's appointment did not violate his rights.

2. The decision not to renew the Applicant's appointment was not vitiated by improper motives or any other extraneous factors.

The Tribunal, having deliberated from 30 June to 24 July 2003, now pronounces the following Judgement:

I. Immediately prior to 31 July 1998, the Applicant had been employed by the Organization under a fixed-term contract as a Documents Clerk, DGAACS. On that date he was separated from service on the expiration of his fixed-term contract.

The Applicant's said separation from service had been preceded by a long period of financial uncertainty within the United Nations. This regime had been in existence for at least some years prior to the Applicant's separation from service as, in 1995, despite a recommendation that the contracts of the Applicant and other staff members on fixed-term contracts should be extended for a further two years, OHRM could only authorise a three month interim extension "in light of the then prevailing financial circumstances"

II. On 13 October 1997, the Under-Secretary-General for Management wrote to all Heads of Departments/Offices concerning the proposed programme budget for the 1998-1999 biennium, which contained post reductions that would take effect 1 January 1998. Some twelve General Service posts in the DGAACS

Distribution Section were slated for abolition, effective on that said date. Of those twelve posts, seven were vacant, one was encumbered by a staff member who had been recommended for an agreed termination and four were encumbered by staff on fixed-term appointments. Sometime prior to 2 December 1997, since no Secretariat-wide procedures had been issued for staffing arrangements in the light of the forthcoming post reductions, DGAACS had reviewed its operational requirements and the performance of General Service staff in the Department and decided not to renew the fixed-term appointments of four staff members, including the Applicant.

On 5 December 1997, the Executive Officer, DGAACS, informed the Applicant that "[his] fixed-term appointment which expires on 31 December 1997 will be extended for a final period of one month, i.e. through 31 January, 1998". Meanwhile, by memorandum dated 2 December 1997, the Under-Secretary-General for Management wrote to the Heads of Departments/Offices indicating that the 1998-1999 budget had been approved by the General Assembly and that measures were being put in place to identify and deploy staff as a result of the post reductions. In that regard he provided Secretariat-wide guidance as to the procedures to be followed to identify those staff members to be reassigned within the Department/Office, those staff members to be reassigned outside the Department/Office and those whose fixed-term appointments would not be extended and thus terminated.

Pursuant to the provisions of the said memorandum, an ad hoc DGAACS Staff/Management Advisory Panel on the Distribution Section (hereinafter referred to as the "ad hoc Panel") met for the purpose of implementing the instructions set out in the memorandum and on 23 December it duly submitted its first report review. The ad hoc Panel had reviewed the overall performance of some twenty-six General Service staff members, including the Applicant. It identified just four staff members for redeployment, which number did not include the Applicant. It concluded that since there were "no expected vacancies within the Department suitable to accommodate any of the fixed-term staff members identified for redeployment", OHRM should "be asked to look for posts on which they could be redeployed, on the understanding that the staff members concerned would be considered, if need be, for mission assignments prior to any other possible action".

III. In February 1998, the Applicant, along with other staff members in the Distribution Section, filed complaints with the Panel on Discrimination and other Grievances concerning the Distribution Section's handling of administrative and personnel matters.

IV. On 1 March 1998, the Applicant was given a contract for five months and was transferred from a permanent post to the post of a staff member serving on a field mission and due to return to Headquarters on 31 July 1998. The said staff member duly returned to Headquarters and resumed duty there on that date and, since the Applicant's fixed-term contract thereupon expired, he was separated from service with effect from 1 August 1998.

V. The Applicant's principal submission is not so much that the Administration was not entitled to abolish the various posts in the light of the prevailing financial circumstances, or that the post reductions were in themselves unauthorised, but rather that he was unfairly selected for separation. He submits that the process whereby he was selected for separation was objectively unfair and motivated by personal prejudice and that he was singled out for separation by reason of a personal vendetta against him. The Applicant argues that he enjoyed seniority and superior performance ratings over some of his colleagues within DGAACS, whose contracts were extended, renewed or who were redeployed within the Organization. The Applicant further submits that, because the Administration has failed to put forward reasons which, he believes, would justify his separation, the decision to separate him should be considered to have been vindictive or motivated by prejudice or some extraneous factor.

In effect he submits that it is for the Respondent to put forward evidence to negative malice and, that a failure to offer such convincing evidence should cause the Tribunal to conclude that his separation was actuated by malice or unfairness.

VI. The Applicant submits that, by reason of the circumstances in which he was separated, he should be reinstated in the position occupied by him as if he had never been separated and that he should be paid compensation for the various losses and expenses which he claims to have suffered. He further claims that the contract given to him as of 1 March 1998, when he was given a five-month fixed-

term contract and placed against a mission replacement post, was not a decision made for a bona fide motive, nor made in his interests. Rather, he claims that this transfer was made so as to increase his vulnerability, with the intention of separating him from service on the return of the said staff member to Headquarters. This, according to the Applicant, provides further evidence of the vendetta, which he claims was being waged by the Chief of the Distribution Section against him.

The Applicant neither cites nor identifies any of the Rules or Regulations or any of "the well established or appropriate procedures" that he alleges were breached, nor does he put forward any factual evidence that a personal vendetta was being waged against him. Rather, he appears to hope that the Tribunal will be able to find a breach of some Rule or Regulation applicable to his generalised complaints and that malice or a campaign of victimisation will be inferred. The Applicant argues that, "since he was separated without any rational or valid reason", such a malicious or vindictive motive should be inferred. He further appears to rely on various observations, findings and recommendations made by both the Panel on Discrimination and other Grievances and by the Staff/Management Task Force on the Distribution Section, both of which were highly critical of the style and competence of the management of the Section, in general, and the Chief of the Section, in particular. The Panel and the Task Force concluded that the mismanagement of the Section caused problems, which bore negatively on the general conditions of work within the Section. In addition, such mismanagement was found to have resulted in decisions that lacked transparency and that were made without appropriate consultation. The Applicant offers these findings as evidence that the decision to separate him from service was unwarranted, malicious or otherwise infirm. The Applicant further relies on a recommendation made by the Task Force "that the Department of Management should review the possibility of providing two posts in the Distribution Section for the early re-employment of the two former staff members", this being a reference to the Applicant and another staff member, who had been similarly separated from service from the Distribution Section in like circumstances and around the same time.

VII. The Applicant had, prior to the JAB's deliberations on his appeal, been re-employed by the Organization, honouring the recommendation which had been made by the Staff/Management Task Force.

VIII. The JAB, in its report, had expressed a finding that the Applicant had to separate from the Organization as of 1 August 1998, "as a result of the mismanagement problems that his section was facing during that time". It continued:

> "[t]he Panel was satisfied with the fact that the above was recognized by the Staff/Management Task Force's Report and by its recommendation to re-employ the [Applicant]. The Panel took note that, based upon the above, the [Applicant] was rehired on a fixed-term appointment in May 1999, and since then, he is serving with DGAACS. The Panel agreed with the Respondent that the contested decision was moot due to the subsequent decision to rehire the [Applicant]."

The Tribunal does not agree with the JAB's conclusion. The fact that the Applicant was re-hired does not render the contested decision moot. For a period of seven months, the Applicant was not employed and, if the decision to separate him was taken in violation of his rights, this would warrant his compensation for these seven months of unemployment.

IX. As to the Applicant's submission that his separation from service had been motivated by malice or by consideration of extraneous factors, the JAB noted "that although the above separation indicated serious mismanagement, this was not tantamount to an action motivated by extraneous considerations and flawed by procedural irregularities". The Panel felt therefore that the rehiring of the Applicant "rectifies the harm he suffered from his separation and there is no need for recommending additional compensation."

The JAB did not recommend that the Applicant be reinstated retrospectively from 1 August 1998, but recommended that "due to the special circumstances of this case" that the Organization "should take the necessary steps, by paying the Organization's part and the [Applicant's] part to the Pension Fund, to reintegrate the [Applicant] into the Pension Fund so that there will be no break in his pension contributions despite his seven months of non-service".

By letter dated 13 February 2001, the Respondent confirmed his acceptance of that said recommendation. The Tribunal can find nothing in the said letter to suggest that

the Respondent had accepted that the Applicant had been unfairly or improperly selected for separation. The Respondent accepted the JAB's recommendation to make good the pension contributions for the period between 1 August 1998, when the Applicant was separated from service and 3 May 1999, when he was re-employed by the Organization. However, since the Applicant had at the time of his separation from service, made a withdrawal from the Pension Fund by way of reclaiming earlier contributions and since he has failed to repay to the Pension Fund the amount so withdrawn, it has not been possible for the Respondent to integrate the Applicant in the manner recommended and it will not be possible to do so, unless and until the Applicant makes repayment of the sum so withdrawn. However, it appears that the Respondent remains willing to make the payments recommended by the JAB should the Applicant repay the monies he had withdrawn.

X. Dealing now with the Applicant's claims that he has been separated from service as a result of malice or of a personal vendetta waged against him, it is the well established jurisprudence of the Tribunal that the Applicant carries the onus of proving this allegation by offering convincing evidence in support thereof. (See, for example, Judgements No. 834, *Kumar* (1997) and No. 874, *Abbas* (1998).)

The Tribunal, like both the JAB and the Staff/Management Task Force on the Distribution Section, has failed to identify any convincing evidence in support of the proposition. The Tribunal is satisfied that the JAB was in error when it appears to have concluded that the Task Force, either by its findings or by its recommendations, had established that the Applicant's separation had been brought about by mismanagement problems. No such finding was made, nor, on the Tribunal's reading of the Task Force's Report, can such a finding be implied or inferred.

The Task Force had considered whether "the decision to terminate" had been inconsistent with the established procedures or guidelines. It noted that the Panel on Discrimination and other Grievances "had not specifically found any instances of discrimination against the staff members in question", including the Applicant. Furthermore, having studied the staffing tables of the Distribution Section in some detail, "looking at the relative seniority and qualifications of staff members holding fixed-term appointments as well as the type of post encumbered

(established, mission replacement, etc.)", the Task Force came to the conclusion that "while it was not possible to determine beyond a doubt what motivations lay behind the decision to transfer the two staff members [including the Applicant] from established to mission-replacement posts, that decision had increased their vulnerability", it did not find any motivation by malice or any violation of the Rules of the Organization.

As to the implication contained in the Applicant's submissions, that the Chief of the Section had orchestrated the vendetta which he alleges was waged against him, and that she had borne him ill-will, the Tribunal finds no evidence to support this suggestion. Rather, the Tribunal observes that the evidence would indicate to the contrary, as the Chief of the Section had on a number of occasions recommended the Applicant's contract for substantial extensions. Likewise, the Tribunal can find no evidence to support the Applicant's submission that the five-month extension afforded to him on 1 March 1998 was not in his interests nor made with the *bona fide* intention of retaining him in the Organization for as long a duration as could then be found. In fact, it appears to the Tribunal that had the Applicant not been offered this contract, he would have there and then been separated from service. The Tribunal can find no evidence to support the contention that this was done as part of a plan to eventually separate him from service when the said staff member returned back to Headquarters.

XI. As to the Applicant's claim that he enjoyed better overall performance ratings than his colleagues who were selected by the ad hoc Panel for redeployment, here again this claim is not supported by the evidence. Of the twenty-six General Service staff members, whose circumstances had been examined by the ad hoc Panel, some twenty-five of them had been rated as either "very good" or better, and some nine of those twenty-five had been rated as either "excellent" or "outstanding". Accordingly, the Applicant's rating, which was "very good", was no better than the rating of twenty-five of the twenty-six staff members in question, and some nine of them enjoyed a better rating than did the Applicant. Of the four persons recommended for redeployment, each of them had enjoyed a "very good" rating.

As to the Applicant's claim that his seniority ought to have been a decisive factor when considering those to be selected for redeployment, whilst it

is true to say that the Applicant had seniority over the four whose names had been selected for redeployment, the memorandum of 2 December 1997 had not indicated that where performance ratings were equal, seniority was to be the decisive factor. Under the terms of the memorandum, seniority was just one of a number of factors to be considered and weighed in the balance when determining who should be redeployed and who might have to be separated. The Tribunal has considered the report of the ad hoc Panel and finds nothing therein to support the contention that its deliberations or conclusions were flawed, improper or prejudiced or that it was influenced by any extraneous, improper or malicious consideration.

XII. In all of the circumstances, the Tribunal must reject the Applicant's claim that he was separated from service as a result of a vendetta, bias or prejudice; or that the decision breached any established procedures, Rules or Regulations or was influenced by any improper considerations.

XIII. As to the JAB's finding that his separation was the result of mismanagement problems "that his Section was facing during that time", the Tribunal has failed to find any evidence to support this conclusion.

Accepting for the purpose of the argument, that severe problems had existed within the Section and that poor management had "borne negatively on general conditions of work within the Section", the Tribunal can still not find any evidence to link these findings with the Applicant's submission that he had been vindictively singled out for invidious treatment or that the decisions of which he complains were motivated by any malicious intent.

XIV. As to the Applicant's claim that he was not offered reasonable consideration for a career appointment in accordance with General Assembly resolution 37/126 of 17 December 1982 and staff rule 104.12(b)(ii), the Tribunal is satisfied that this failure does not indicate that he was treated maliciously or differently from his colleagues in a similar situation. The Tribunal is satisfied that this failure is explained by the Secretariat-wide freeze on the granting of permanent appointments to holders of fixed-term appointments, which has existed since March 1992, except for a period between November 1994 and November 1995. The Applicant would not have been qualified for consideration under the

said General-Assembly resolution as between November 1994 and November 1995 as he, inter alia, had not at that time enjoyed five years of continuous service. It would have been obviously futile to have gone through the motions, as if giving consideration to the Applicant for a career appointment when, by reason of the said freeze, no such appointment could have been made.

Accordingly, the Tribunal is satisfied that no circumstances exist which would justify an award of compensation to the Applicant.

XV. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Kevin **Haugh**
Vice-President, presiding

Spyridon **Flogaitis**
Member

Jacqueline R. **Scott**
Member

Geneva, 24 July 2003

Maritza **Struyvenberg**
Executive Secretary

/SAFFIR

United Nations AT/DEC/1122

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1122

Case No. 1235: LOPES BRAGA Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Jacqueline R. Scott;

Whereas at the request of Rubens Lopes Braga, a staff member of the International Trade Centre, United Nations Conference on Development and Trade/World Trade Organization (hereinafter referred to as the ITC), the President of the Tribunal, with the agreement of the Respondent, extended to 31 December 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 5 December 2001, the Applicant filed an Application containing pleas which read as follows:

"II: PLEAS

...

(b) Decision contested: Decision of the Secretary-General agreeing with the Geneva Joint Appeals Board's recommendation, conveyed by letter dated 20 June 2001 ...;

(c) A reasonable financial compensation to be decided upon by the Tribunal;

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 April 2002 and periodically thereafter until 31 August 2002;

Whereas the Respondent filed his Answer on 19 August 2002;

Whereas the Applicant filed Written Observations on 1 October 2002;

Whereas the facts in the case are as follows:

The Applicant entered the service of ITC on 3 September 1978, on a one-year fixed-term appointment at the L-3 level as a Market Development Adviser, Market Development, Technical Division. After a number of contract extensions his appointment was made permanent on 1 January 1991. At the time, he held the P-3 position of Trade Promotion Officer, Technical Co-operation, Office for Asia-Pacific, Latin America and the Caribbean. On 1 April 1991, the Applicant was promoted to the P-4 level.

On 31 October 1997, a vacancy announcement was issued for the L-5 Level post of Senior Adviser on the Institutional Aspects of Trade Promotion (ITC/PVN/12/97). The vacancy announcement was reissued on 1 December 1997 and again on 31 March 1998. On 30 December 1997, the Applicant applied for the post but, on 20 July 1998, was informed that his application had not been retained.

On 7 September 1998 a vacancy announcement was issued for the P-5 level post of Chief, Office for Asia-Pacific, Latin America and the Caribbean, ITC (OAPLAC). The Applicant applied for this post on 6 November 1998. One of the job prerequisites set forth in the announcement was the possession of an "undergraduate degree preferably at the advanced level", a qualification the Applicant possessed. The Applicant was interviewed for the vacancy in February 1999, approximately one month prior to the meeting of the Joint Appointments and Promotion Board (JAPB) by its Review Panel.

On 28 December 1998, a vacancy announcement was issued for the P-5 level post of Chief, Trade Research and Business Intelligence, Division of Product and Market Development, Market Analysis Section, also at ITC, (MAS). On 29 January 1999, the Applicant applied for this post as well. No interviews were conducted. No external candidates were under consideration. In the interim however, a staff member was assigned to the post as Officer-in-Charge for one month.

On 9 March 1999, the Review Panel had short-listed five candidates for the post of Chief, OAPLAC including the Applicant. On 10 March, the staff representative to the JAPB resigned and a replacement appointed.

At its 19 March 1999 meeting, the Review Panel considered the candidates for both the OAPLAC and MAS posts. In addition to permanently retaining the Officer-in Charge then currently in place in the MAS position, it selected the candidate for the OAPLAC post as well. The candidate selected for the OAPLAC post however, did not possess the required academic qualifications for the post specified in the vacancy announcement, namely, an undergraduate degree.

At its meeting on 24 March 1999, the JAPB endorsed the Review Panel's recommendations. The Applicant was informed on 26 March, that his application had not been retained.

On 24 May 1999, the Applicant requested administrative review alleging that a "pattern of discrimination" existed against him as evidenced by an administrative action of 15 April 1998 admonishing him for publishing an article in an external publication and the 20 July 1998 notification to the Applicant of the decision rejecting him for the L-5 level Senior Advisor position.

On 24 June 1999, a vacancy announcement was issued for the L-5 level post of Senior Adviser on Multilateral Trading System, Functional Advisory Services Section, Division of Trade Support Services (FASS/DTSS). The vacancy announcement was re-issued on 26 July. The Applicant applied, but on 9 December, was informed that his application had not been retained.

On 9 August 2000, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 17 May 2001. Its considerations, conclusions and recommendations read, in part, as follows:

"**Considerations**

52. As far as the procedure followed to replace the resigning staff representative is concerned, the [JAB] considered that even though this procedure was not strictly in line with the one stipulated in the Statutes of the ITC Staff Association, it aimed at filling the institutional vacuum created by the resignation that occurred during the selection process. ...

53. With reference to the date of the interview, the [JAB] considered that the fact that the [Applicant] was heard one month before the first meeting of the

Review Panel, as the four other selected candidates, did not prejudice him. He was indeed short-listed following the first session of the Review Panel.

...

58. The [JAB] could not find any evidence to substantiate the [Applicant]'s claim that all candidates were not fully and fairly considered. It found on the contrary that all had been treated fairly.

59. The [JAB] found that as claimed by the [Applicant], the Officer-in-Charge temporarily assigned has been selected later by the Review Panel to fill the post.

61. The [JAB] noticed that [the ITC rules] had been fully respected, to the extent that the Officer-in-Charge has been assigned to the vacant post for one month. Moreover, it did not find any evidence that this gave him an advantage over the [Applicant] in the consideration of his application.

...

63. *Administrative action and decision reflecting a pattern of discrimination.* The [JAB] examined precisely the arguments the [Applicant] put forward to substantiate his claim and related first to the publication of a discussion paper in March 1998. It was recalled that it is a well-established practice among all staff members of the United Nations to seek approval of the Chief of Section or responsible divisional Director prior to submitting a document for publication. The memorandum, which was sent to the [Applicant] following the publication of this document, was in line with the above well-established practice. In that sense, there is no evidence that it had any influence on the development of his career.

64. Concerning the decision dated 20 July 1998 not to promote the [Applicant] to the post of Senior Adviser on the Institutional Aspects of Trade Promotion, L-5, the [JAB] noted that it could not examine the argument to the extent that it is time-barred.

65. *Administrative decision dated 9 December 1999 not to promote the [Applicant] to the post of Senior Adviser on Multilateral Trading System, L-5, [FASS/DTSS].* The [JAB] noted that the [Applicant] added this decision to the previous appeals on 16 February 2000, but had not sent any letter to the Secretary-General requesting review of this administrative decision, as required in Staff Rule 111.2(a).

66. The [JAB] found therefore that a constitutive element of an appeal was lacking, and that it could not go further into the consideration of the case.

Conclusions and Recommendations

67. On the basis of the evidence and information available to it, the [JAB] is unable to conclude that the [Applicant] was not properly and fairly considered in the different promotion exercises within ITC.

68. Accordingly, the [JAB] makes **no recommendation** in support of the present appeal."

On 20 June 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General

agreed with the JAB's findings and conclusions and had decided to accept the JAB's unanimous recommendation and to take no further action on his appeal.

On 5 December 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent has not duly and fully considered the applications of the Applicant for vacancies and has consistently failed to meet its burden of proof against the objections and complaints raised by the Applicant.

2. The Respondent has not properly observed the pertinent UN Staff Regulations, Rules, Procedures and administrative instructions, and the ITC's Personnel Policy Guidelines and Procedures, resulting in a number of administrative actions and decisions that have negatively affected the development of his professional career and tainting the Director-General's decision of 20 June 2001.

3. The JAB failed to consider the evidence of a pattern of discrimination against him, as shown by a series of rejections of his applications for P-5 vacancies, by other administrative actions and decisions, and by the attitude of the ITC Management, which tainted the Director-General's decision of 20 June 2001.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to promotion but only to full and fair consideration for promotion. The Applicant was properly considered for promotion, and his rights were not violated by the decisions not to select and promote him to the two P-5 posts.

2. The contested decisions were not improperly motivated or founded on extraneous factors.

3. The appeal as it relates to the decisions of 20 July 1998 is time-barred. The appeal as it relates to the decision of 9 December 1999 is not properly before the Tribunal.

The Tribunal, having deliberated from 4 July to 24 July 2003, now pronounces the following Judgement:

I. The Applicant seeks review of two administrative decisions not to promote him from his P-4 level post to one of two P-5 level positions in ITC: (1) Chief, Office for Asia-Pacific, Latin America and the Caribbean, and (2) Chief, Trade Research and Business Intelligence. The Applicant also requests that a third post to which he had applied and from which he had been rejected -- Senior Advisor on Multilateral Trading System, at the L-5 level -- be included in his appeal. Fearing that his third claim might be non-receivable, the Applicant, in the alternative, seeks to use the non-promotion as evidence of a pattern of discrimination and prejudice against him.

II. With respect to the post of Chief, Office for Asia-Pacific, Latin America and the Caribbean, the Applicant asserts that the selection process that led to the promotion of another internal candidate was not undertaken in accordance with the rules contained in ITC's Personnel Policy Guidelines and Practices (the "Guidelines and Practices"). He also contends that criteria used for the selection process were in violation of the Guidelines and Practices. With respect to the post of Chief, Trade Research and Business Intelligence, he contends that the procedure to fill the post did not respect the requirement for fair competition. With respect to the third post, Senior Advisor on Multilateral Trading System, the Applicant asserts that the decision to hire an external candidate older than 50 years of age violated the ITC Guidelines limiting recruiting of external candidates to 50 years, in the case of P-5 level positions.

III. The Tribunal's task is to determine whether the Respondent's decisions not to promote the Applicant were a proper exercise of its discretion or whether these decisions were vitiated by prejudice or other extraneous factors, including procedural irregularities, that denied the Applicant full and fair consideration for the posts for which he was rejected.

The Tribunal has consistently recognized the considerable latitude of discretion that the Secretary-General has in promoting and in filling vacancies in the Secretariat (see Judgment No. 362, *Williamson* (1986)). Thus, qualifications, experience, favourable performance reports, and seniority are appraised freely by the Secretary-General, and therefore cannot be considered by staff members as giving rise to any expectancy of promotion. (See Judgement No. 955, *Draz* (2000) citing Judgement No. 411, *Al-Ali* (1988)).

This discretionary power of the Secretary-General to evaluate and promote candidates, however, is not without boundaries -- the Administration's discretion shall be reviewed when there are allegations of abuse of discretion, procedural irregularities, bias, prejudice or discrimination. (See Judgement 1056, *Katz* (2002)).

IV. The Tribunal addresses first the Applicant's contention that the selection process that led to the denial of the promotion of the Applicant to Chief, Office for Asia-Pacific, Latin America and the Caribbean, was not in accordance with the Guidelines and Practices. The Applicant asserts that he was interviewed for the post one month before the JAPB was convened. This was in direct contravention to paragraph 23 of the Guidelines and Practices, which states that the Review Panel will advise on applicable rules and procedures, undertake the review of eligible internal candidates and qualified external candidates and "will thereafter prepare a list of qualified and eligible internal applicants as well as qualified external candidates subject to reference checks and to be called for interviews". The Respondent concedes that the Review Panel did conduct a limited number of interviews prior to the formal meeting of the Panel, but asserts that the interview was not closed when the meeting was held. He also contends that the Applicant was not harmed, because the Applicant was "short-listed" after the interview.

The Applicant also asserts that the Respondent did not follow his own procedures when one of the members of the JAPB resigned. Pursuant to paragraph 23 of the Guidelines and Practices, elections must be held to fill the JAPB vacancy. Instead, an unelected ITC staff member was designated to participate in the JAPB meeting, and the Respondent held elections thereafter. The Respondent concedes that it did indeed deviate from the rules required by the Guidelines and Practices regarding replacement of a resigning member, but argues that it eventually held elections, and the interim member appointed was elected as an alternate member.

V. The Applicant further alleges that, with respect to the post of Chief, Office for Asia-Pacific, Latin America and the Caribbean, the criteria used for the selection process, as described in the Guidelines and Practices were not respected. Specifically, the Applicant alleges that objective criteria of evaluation were not used -- the Applicant challenges the selection of the successful candidate on the basis that the successful candidate did not possess an undergraduate degree, as required by the vacancy notice. "The Tribunal's jurisprudence emphasizes that it is not the

Tribunal's role to substitute its judgment for that of the Secretary-General, but merely to ascertain whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled. (See Judgement No. 447, *Abbas* (1989).) Once called seriously in to question, however, the Respondent must be able to make at least a minimal showing that the Applicant's statutory right was honoured in good faith, in that the Respondent gave it's 'fullest regard' to it". See Judgement No. 362, *Williamson* (1986). (See Judgements No. 447, *Abbas* (1989) and No. 490, *Murphy* (1990).)

The vacancy notice did indeed require an "undergraduate degree preferably at the advanced level", and the Respondent provides no evidence that the successful candidate possessed the requisite academic degree; the Respondent merely asserts that academic qualifications are only one factor in the decision-making process. Based on the record, it would appear that the Applicant, who did possess the requisite "undergraduate degree preferably at the advanced level" satisfied the threshold requirements of the vacancy but was rejected, while the successful candidate who did not possess the requisite minimum academic qualifications got the job, notwithstanding his inadequate qualifications. The Tribunal finds that the Respondent's failure to follow its own procedures; i.e., to apply objective criteria of evaluation in a consistent manner, was a violation of the Applicant's right to be fully and fairly considered for the post and irreparably harmed the Applicant. In reaching this decision, however, the Tribunal notes that it expresses no independent opinion as to whether the possession of an academic degree was essential to the performance of the tasks of the post in question. Had the Respondent advertised the post as preferring an undergraduate degree, rather than requiring one, the Respondent would have been free to give the possession of the degree, or lack thereof, whatever weight it chose. By advertising the post, however, as one that required an undergraduate degree, the Respondent made the degree a pre-requisite to selection for the post and cannot now be heard to argue that the possession of the degree was but one factor in its determination. To allow otherwise harms not only the Applicant, who was misled and not fairly considered by objective criteria for the position, but also harms all those putative applicants who did not apply because they did not possess an undergraduate degree.

VI. The Tribunal has previously held that formal procedures are safeguards which must be strictly complied with. The failure of the Respondent to adhere to its own

rules, the adherence to which is strictly and solely within the power of the Respondent, represents an irregularity which amounts to a violation of the Applicant's right to due process, for which the Applicant should be compensated. (See Judgement No. 1047, *Helke* (2002).)

VII. With respect to the Applicant's contentions regarding the post of Chief, Trade Research and Business Intelligence, the Tribunal rejects the Applicants contentions that the procedure adopted to fill the post did not respect the requirement for fair competition. The Respondent's decision to fill temporarily the post, for a period of one month, with a staff member and then to fill permanently that post with the same staff member was within the purview of Paragraph 11 of the Guidelines and Practices. The decision not to conduct interviews was also within the Respondent's right, because there were no external candidates. The Applicant has provided no evidence to support his allegation that he suffered unfair competition.

VIII. With respect to whether a discretionary decision, such as the decision not to promote the Applicant, has been tainted by prejudice, discrimination or improper motive the burden of proving such prejudice or improper motive is on the Applicant (see Judgment No. 834, *Kumar* (1997). The Tribunal finds that the Applicant has failed to provide sufficient evidence to support his claims that the Respondent's decisions were motivated by prejudice, discrimination or improper motive.

IX. The Tribunal agrees with the JAB's conclusion and finds that the Applicant's claims relating to the Respondent's decision not to promote the Applicant to the post of Senior Advisor on Multilateral Trading System, are not receivable. The Applicant had not requested of the Secretary-General review of this matter, as required by staff rule 111.2(a), and, therefore, a constitutive element of this claim is lacking.

For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay to the Applicant six months net based salary for the violation of his due process rights stemming from procedural irregularities engaged in by the Respondent;

2. Rejects all other pleas.

(Signatures)

Mayer **Gabay**
First Vice-President

Spyridon **Flogaitis**
Member

Jacqueline R. **Scott**
Member

Geneva, 24 July 2003

Maritza **Struyvenberg**
Executive Secretary

/LOPES BRAGA